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Khairun Nizad bin Daud & Anor v Juprin Paul

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HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO JA-12B-4–01 OF 2017
MOHD IVAN JC
12 FEBRUARY 2018

C

Tort — Road accident — Quantum — Collission between car and motorcycle — Prosthesis — Contributory negligence — Cross-appeal — Quantum of cost of prosthesis — Quantum reduced

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The appellants appealed against the decision of the sessions court judge who had found them 80% liable and the respondent 20% liable for an accident where there were conflicting accounts of how the accident occurred. The respondent also cross appealed against the finding of them being 20% liable and on the quantum awarded. The accident was between the appellant who was driving a car and the respondent who was riding a motorcycle with a pillion rider. Both parties had claimed that the collision had occurred as a result of the other party encroaching onto the opposite lane.

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Held, allowing the appeal only on quantum of costs of prosthesis reduced from RM586,004 to RM254,877:

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(1) There was no error of fact or of law on the part of the sessions court judge on her finding of liability that would compel the judicial commissioner to disturb her finding of liability on the part of the first appellant with 20% contributory liability on the part of the respondent. The decision of the sessions court judge in apportioning liability onto the respondent was reasonable and did not offend against any principle of law (see paras 35–36).

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(2) The judicial commissioner agreed with the finding of the sessions court judge who was aided by the evidence of the investigating officer. The sessions court judge had considered the totality of the evidence. Road users have a duty to remain vigilant at all times as public roads are a venue for danger where no person should be entitled to be off guard merely due to the fact that it was a quiet stretch of road or a time of day where traffic volume was low (see paras 29–30 & 32).

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(3) The judicial commissioner was not convinced that a prosthesis that costs RM254,877 would not serve the purpose as well as one that cost

RM586,004. The award of damages in a personal injury case was to compensate the victim and should not be a tactical manipulation of the system (see paras 55 & 68).

(4) There was no reason to disturb the finding of the sessions court judge with regards to the award for partial loss of future earnings as there was no evidence that the respondent would not be able to work after the accident. Having received the award to purchase the prosthesis, there should not be any impediment for the respondent regain suitable employment (see paras 70–71 & 73).

[Bahasa Malaysia summary

Perayu-perayu merayu terhadap keputusan hakim mahkamah sesyen yang mendapati mereka bertanggungan 80% dan responden bertanggungan 20% untuk kemalangan di mana terdapat keadaan bercanggah bagaimana kemalangan berlaku. Responden juga merayu balas terhadap dapatan yang mereka bertanggungan 20% dan atas kuantum yang diawardkan. Kemalangan adalah di antara perayu yang memandu kereta dan responden yang menunggang motosikal dengan pembonceng. Kedua-dua pihak mendakwa bahawa pelanggaran telah berlaku akibat pihak yang satu lagi menceroboh ke lorong bertentangan.

Diputuskan, membenarkan rayuan hanya atas kuantum kos prostesis dikurangkan daripada RM586,004 kepada RM254,877:

(1) Tidak terdapat kesilapan fakta atau undang-undang oleh pihak hakim mahkamah sesyen atas dapatan liabilitinya yang akan memaksa pesuruhjaya kehakiman menganggu dapatan liabilitinya oleh pihak perayu pertama dengan 20% liabiliti sumbangan oleh pihak responden. Keputusan hakim mahkamah sesyen dalam membahagikan liabiliti ke atas responden adalah munasabah dan tidak melanggar terhadap mana-mana prinsip undang-undang (lihat perenggan 35–36).

(2) Pesuruhjaya kehakiman bersetuju dengan dapatan hakim mahkamah sesyen yang dibantu oleh keterangan daripada pegawai penyiasat. Hakim mahkamah sesyen telah mempertimbangkan keseluruhan keterangan. Pengguna-pengguna jalanraya mempunyai kewajipan untuk sentiasa berjaga-jaga pada keseluruhan masa kerana jalanraya awam adalah tempat bahaya di mana tidak seorang pun patut tidak berhati-hati hanya kerana fakta bahawa ia adalah jalan yang sunyi atau pada masa di mana jumlah lalu lintas adalah rendah (lihat perenggan 29–30 & 32).

(3) Pesuruhjaya kehakiman tidak yakin bahawa prostesis yang kosnya RM254,877 tidak akan membantu begitu juga yang kosnya sebanyak RM586,004. Award ganti rugi dalam kes kecederaan peribadi adalah untuk memberi pampasan kepada mangsa dan tidak patut menjadi manipulasi taktikal sistem (lihat perenggan 55 & 68).

(4) Tidak ada sebab untuk menganggu dapatan hakim mahkamah sesyen berkaitan kepada award untuk kehilangan sebahagian pendapatan masa hadapan kerana tidak terdapat keterangan bahawa responden tidak dapat bekerja selepas kemalangan. Dengan menerima award untuk membeli prostesis, tidak patut terdapat apa-apa penghalang untuk responden mendapatkan pekerjaan yang sesuai (lihat perenggan 70–71 & 73).]

Notes

For a case on quantum, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2393.

Cases referred to

Goh Beng Seng v Dol bin Dolah [1970] 2 MLJ 95b (refd)
Sevasangar a/l P Ramasamy dan satu lagi lwn Abdul Nazar [2014] 8 MLJ 236, HC (refd)
UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals [2007] 6 MLJ 530, CA (refd)
United Plywood and Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237, FC (refd)

Teo Say Koo (Teo Han Ley with him) (Teo & Assoc) for the appellants.
Harjinder Singh a/l Kuldip Singh (Sabarudin Othman & Ho) for the respondent.

Mohd Ivan JC:

[1] The appellants were defendants in the sessions court, who are appealing against the decision of the sessions court judge who had found them 80% liable and the respondent, as plaintiff, to have contributed in 20% in an accident where there were conflicting accounts of how the accident occurred.

[2] The respondent, as plaintiff, had also cross-appealed against the finding that he was 20% liable and on the quantum awarded.

[3] The plaintiff was riding a motorcycle bearing registration No JNU6769, with a pillion rider, along a road when there was a collision with a car with registration No MBL9767 ('the car') coming from the opposite direction. Both claimed the other to have been encroaching.

[4] On the issue of liability, the sessions court judge found largely for the plaintiff, as she had deduced from the silent evidence that the car driven by the first defendant had encroached into the plaintiff's side of the road.

[5] This was raised as a ground for appeal that she had accepted the version of how the accident occurred based on the opinion of the investigating officer who had testified that the defendant's car had encroached into the path of the

A oncoming plaintiff's motorcycle when avoiding a hole on the defendant's side of the road.

[6] A traffic summons has also been issued to the first appellant/defendant.

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[7] The sessions court judge had however found 20% contributory negligence on the part of the plaintiff in failing to take any evasive action to avoid the collision.

C **[8]** Whether he had intended to or otherwise, the respondent had testified that the collision had occurred at the point marked A1–A2 on the sketch plan, which would be on the car's side of the road and consistent with the tire marks where the car had come to a halt.

D **[9]** Tire marks on the road would suggest that the car was going fast, and therefore coming to an emergency stop would produce tire skid marks. Whether the tire skids marks would tell the entire story would be another matter, as there may be some time taken to react before the brakes were fully engaged.

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[10] Quite consistent with the sessions court judge's finding would be a scenario where the car had been travelling fast, and upon seeing the hole on the road, the car may have swerved to avoid it, thereby encroaching into the oncoming lane.

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[11] However, upon realising the presence of the motorcycle, the car may have attempted to go back into lane, and likewise the motorcycle may have swerved slightly, but not before a glancing blow had been struck.

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[12] The car may have then screeched to a halt on the left shoulder of its lane and the plaintiff's motorbike collapsed near where impact occurred and hence the scratch marks on the road.

H **[13]** The first appellant had contended that the fact that the tyre skid marks were on his side of the road just before his car had stopped on the left shoulder of the road would support his version that the collision occurred on his lane, thereby causing him to brake suddenly, ending up of the left shoulder.

I **[14]** The investigating officer had testified that the road was narrow, which was consistent with the photographs of the scene of the accident, with only one lane each way.

[15] It would be very easy, or even expected that a car, which would occupy

its entire width of its lane, may have a tendency to straddle the median of both lanes (in the middle of the road) to allow additional leeway especially when driving quite fast.

[16] It would take a highly focussed driver to keep within his/her (narrow) lane when driving quite fast, and upon seeing any irregularity on the road, whether it be surface (pothole, water puddle or depression) or otherwise (an object, roadkill or debris), the natural tendency or reaction would be to swerve and avoid, especially if traffic was not heavy, in order to avoid sudden braking and losing control/momentum.

[17] As for a smaller vehicle like a motorcycle, riding in the middle of the road would still mean riding within its lane. Unless the rider was suicidal, there would be no necessity to encroach into the oncoming lane.

[18] Here, we are not dealing with a minute possibility that the respondent could have encroached, which of course remains a possibility. However, we must confine ourselves to the balance of probability or inherent likelihood, and not a farfetched possibility.

[19] Looking at the photographs of the car, the damage was on the driver's door nearer to the front right wheel. The front bumper does not appear to have any sign of collision. Logically, it has to be one or the other. If there was a head on collision, the front bumper of the car would be damaged, and it cannot be that the side of the car was also damaged, and vice versa.

[20] If the car had occupied the entire width of its side of the road, and collision had occurred as a result of the motorcycle encroaching onto the oncoming car's side of the road, the collision could only have been head on, with impact zone along the front bumper of the car.

[21] The driver of the car testified that the motorcycle encroached and he had to veer left to avoid the motorcycle, which still hit the front right side of his car.

[22] It was not disputed that where the accident occurred was a straight stretch of road.

[23] From the photographs, there can be seen some diagonal car tyre skid marks from the road median going left, and further tyre skid marks just beforethe car finally stopped on the left shoulder of the road. Whether this was from the car trying to veer left to avoid colliding into the motorcycle which had

encroached into the car's lane or from re-entering its lane after encroaching to the other lane are equally arguable.

[24] Even a slight veering left of the car to avoid the motorcycle would have taken it partially off the road/lane it was travelling on, which would be inconsistent with tyre skid marks from the tyres on the left side of the car showing on the road.

[25] Let us look at the inherent probability of the motorcycle encroaching on the car's side of the road. The immediate question would be as to why the motorcycle would need to do so. Riding in the middle of the road for a motorcycle would still be within the motorcycle's side of the road. This would not be so in the case of a car, which will have to straddle the road median.

[26] For a motorcycle to be on a straight stretch of road encroaching in the oncoming lane with full view of an oncoming car would make little or no sense. If the motorcyclist was indeed suicidal, he would have slammed head on into the car and be done with it.

[27] Even if the motorcyclist had suddenly or otherwise realised he was wrongly in the oncoming lane, a slight manoeuver could have brought him back into his rightful lane on seeing the oncoming car.

[28] From the photographs, the motorcycle was a Honda Cub, and with a pillion rider, the ability and propensity for speed would surely be much lower than the car, which was a Proton Waja carrying only one driver.

[29] Weighing all of these factors, I cannot find myself to be in disagreement with the factual finding of the sessions court judge, who I would only go so far as to say had been aided by the evidence of the investigating officer.

[30] Despite submissions by the appellants to that effect, I am not minded to agree that the sessions court judge had accepted the evidence of the investigating officer wholesale when coming to a decision. At best, she had considered the totality of the evidence, which I am not minded to fault.

[31] On the finding of contributory negligence of 20% on the part of the respondent, the rationale by the sessions court judge was that the respondent could or should have done something which would have mitigated the severity of the collision and hence the injuries suffered.

[32] I am in agreement that there is always a duty on road users to remain vigilant at all times as public roads are always a venue for danger, whichever

time of the day or location, where one can never be entitled to take it easy and be off-guard because it is a quiet stretch of roads or a time of the day where traffic volume is low.

[33] There is sometimes also a stubborn attitude of some drivers to consider that when they have right of way, the road is 'theirs' where any little interruption or interference with their 'right of way' would be subject to annoyance, irritation and a tendency to 'hold their ground' and not give way as it is their 'legal' right of way. They will have sufficientpresence of mind and time to sound their horn, gestureor otherwise indicate to the person offending against their right of way, but not to slow down or yield — which in the matter of a second or two, would have been sufficient to cause the incident to come to pass.

[34] In this regard, I have reason to refer to the decision in the case of *Goh Beng Seng v Dol bin Dolah* [1970] 2 MLJ 95b which had espoused the following:

> There can be no territorial or geometrical division of the road. The centre line remains a guide and a reminder only. One's duty is to ensure safety for oneself and for others. The attitude of mind that because the driver coming from the opposite direction is encroaching a few inches of my side of the road, I can treat him as a trespasser and proceed on my half of the road as if it was my exclusive domain and that I am totally immune from liability if I drive within the exact limits of that 'realm' even though I know that an accident may thereby happen on my side of the road, is the attitude of an irresponsible and an irrational being. I owe a duty to others on the road just as others owe a duty to me.

[35] I would find the decision of the sessions court judge in apportioning liability onto the respondent in the manner that she had to be reasonable and not to offend against any principle of law.

[36] I therefore find that there is no apparent error of fact or of law on the part of the sessions court judge on her finding of liability that would compel me to disturb her overall finding of liability on the part of the first appellant/defendant with 20% contributory liability on the part of the respondent/plaintiff.

[37] The appellant's appeal against quantum is largely on the costs of prosthesis allowed, where there was evidence that a prosthesis had been offered by SOCSO but rejected by the respondent.

[38] The law on appellate intervention with regard to quantum had been expressed in the case of *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 at p 238 where the Federal Court had stated as follows:

> ... the assessment of damages in cases of personal injury is one of the most difficult things for either a judge in the first instance or a Court of Appeal. When a man has lost his arm there is no sum in the world that can in the true sense compensate for it. Yet compensation in the form of money is the only way in which he can be granted redress for the injury he has suffered. It is neither possible nor desirable for damages for the loss of an arm to be standardised or rigidly classified, as no two cases are ever alike. But in order to maintain some semblance of uniformity, the amount awarded in past cases, which bear reasonable comparison with the case under review, should serve as a useful guide. *The general principle is that an appellate court can only interfere with the assessment if it is considered so inordinately low or inordinately high as to make the court exclaim, good gracious, is that the sum which has been awarded? The sum must be altered, or if it is so much out of line with the discernible trend or pattern of awards in reasonable comparable cases that it must be regarded as a wholly erroneous estimate.*

[39] Here, the award of a sum of RM586,004 for a prosthesis would immediately invite a closer look.

[40] It was supposedly allowed as the quotation put up by the appellant from KK Prosthetic & Orthopaedic Equipment Sdn Bhd for RM254,877 had not been considered because there was no witness called by the respondent.

[41] The respondent had even cross-appealed against the said amount and canvassed a proposition that the award for the prosthesis was low, whereby a sum of RM1.5m ought to have been awarded instead.

[42] It was the respondent's contention in his cross-appeal that restitution in integrum ought to be applied in line with the case of *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals* [2007] 6 MLJ 530, where it formed part of the finding of the Court of Appeal as follows:

> [112] I would first set out the general object of awarding damages contained in *Clerk & Lindsell on Torts* (16th Ed), at p 254 para 5-04:
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> > The general object of an award of damages is to compensate the plaintiff for the losses, pecuniary and non-pecuniary, sustained as a result of the defendant's tort. More specifically, the assessment process is said to aim at *restitutio in integrum*. The general principle is, in the oft-quoted words of Lord Blackburn, that the court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'. The principle admits of application to losses which are capable of reasonable precise calculation in money terms.

[43] The approach taken by the respondent in his cross-appeal would seem to be whether he ought to be put into the best position that money can buy, as

it was no longer so much a question of whether the prosthesis in question was good enough to be used, but whether he was entitled to the best prosthesis that money could buy.

[44] The claim for a prosthesis would usually be based on a quotation (not that the device had already been purchased) and some witness called to extol its utility and comfort to the victim, who would inevitably testify with a grimace that a cheaper type was painful to use and thus not suitable.

[45] There was never any evidence that the intended user of the prosthesis had tried on the prosthesis, which was the subject of the quotation, and found it suitable for use.

[46] This has also not accounted for a reasonable assumption that any prosthesis, cheap or expensive, would take some getting used to, and that the evidence of the person selling a particular type of prosthesis (usually the expensive one) should be taken with a pinch of salt as partially the sales pitch of a salesman with some interest to promote a sale.

[47] A arbiter of fact should not fall hook, line and sinker too easily; sympathy aside.

[48] Tossed into the equation was also evidence that SOCSO had offered to provide the respondent with a prosthesis which would be without charge, which the respondent had rejected, purported because he had tried it on and fell a few times. Again, does a person get on a bicycle for the first time and immediately ride without falling off once?

[49] Whether it was wholly unsuitable for him or that he had not gotten used to it, was not clear from the evidence. In short, the respondent took the position that the most expensive would be the best for him — despite not having the benefit of looking at it or trying it out.

[50] Loss of earnings and earning capacity would be based on, and guided by the current income.

[51] Similarly, damage to a vehicle would attract repair costs for repair to that same vehicle and not based on a higher priced vehicle or for his vehicle to be replaced with a luxury car.

[52] However, when we come to an award for a prosthesis, all rules seem to fly out the window, as there is no compendium or guidelines as to what would be adequate or reasonable.

[53] Bearing in mind that the award of damages is intended to be compensatory in nature, some degree of proportionality must be imposed.

[54] There was another quotation of RM254,877 which was argued to have been sufficient to serve its purpose. The utility of this prosthesis was never challenged, likely on the basis that the more expensive the better in meeting with restitutio in integrum.

[55] I am not convinced at all that a prosthesis costing RM254,877, which is not cheap by any reckoning, would not serve the purpose as well as one costing RM586,004. As for one costing RM1.5m, it would warp the balance of probabilities, to put it mildly.

[56] It has then become a stock standard argument that a victim is entitled to reject a 'hospital issue' prosthesis although it may be provided free by SOCSO on the authority of *Sevasangar a/l P Ramasamy dan satu lagi lwn Abdul Nazar* [2014] 8 MLJ 236 where it was, inter alia, held that:

> The plaintiff, as a victim that was hit by the defendant, had a right to choose whether the leg would be supplied by SOCSO or another manufacturer. The plaintiff had a right to receive a prosthetic leg that was far more advanced and lighter for the ease of his movements. The plaintiff was also a big-sized person. The plaintiff had a choice under s 28A of the Civil Law Act 1956. The question of unjust enrichment did not arise here. The plaintiff was not making a claim for two prosthetic legs from SOCSO nor another manufacturer (see paras 7–9).

[57] I have no doubt that there will be a range of prosthesis where medical opinion, or preference rather, would steer towards one type rather than another.

[58] To be restrained by some degree of proportionality must be brought to bear, more so when we are in an adversarial system where getting the most out of litigation can only be expected.

[59] Once the 20% contributory negligence has been accounted for in the award of damages, the costs for the prosthesis allowed would be cut by 20% and surely be insufficient to pay for that particular prosthesis, at the quoted price.

[60] If the free offer by SOCSO is reconsidered, there is a high likelihood that the amount awarded to the respondent for the purchase of a prosthesis may not be utilised for the purpose intended by the award.

[61] Once an award has been finalised, there is a weakness in the system in

being able to monitor, control or dictate whether the sum awarded will be directed to the purpose intended. A

[62] In that sense, the court must remain vigilant as to what goes on in the running down practice so as not to invite, condone and engender abuse in the way of manipulating of claims, which is not what damages are for and will be to the detriment of the industry as a whole. B

[63] Apart from the question of whether the respondent would really use the award allowed for prosthesis to buy one costing so much, there is the stark reality that once liability had been apportioned as such, the amount would be cut by 20%, thereby giving rise to the question of whether the sum would be enough to buy the prosthesis even if the respondent was truly inclined to do so. C

[64] This has not yet accounted for another possibility that the prosthesis may be subject to anincrease in price. D

[65] Again, as there does not appear to be any regulatory mechanism or any monitoring of compliance, there is no assurance that any award for prosthesis will be channelled specifically for that purpose and for the same type as per the quotation. E

[66] The appellants have canvassed the possibility of the award for prosthesis being deposited with Amanah Raya Bhd to be released to the respondent only upon purchase. This was the mechanism seemingly allowed in another case. F

[67] If an award had been made for purchase of the prosthesis as per quotations and invoices tendered in court, let the funds be for those purpose, and not to supplement other purposes. G

[68] The award of damages in a personal injury case is to compensate the victim in the manner it is supposed to, and should not be a tactical manipulation of the system to squeeze as much out as possible. H

[69] It is on that note that the appeal on quantum in this case will be allowed only in so far as the costs of the prosthesis of RM586,004 is revised downwards to RM254,877, and the appeal is hereby allowed only to that extent.

[70] As to loss of future earnings, there was no evidence that the respondent would not be able to work at all after the accident. In fact, the evidence supports his ability to work. I

[71] Having received an award to purchase the prosthesis, there should not

A be any impediment to attempt to regain suitable employment. However, the approach taken to maximise the claim for future loss of earnings would indicate that there was no intention to get back to work, so claiming for the highest cost of a prosthesis to facilitate maximum mobility would not be in any way consistent.

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[72] The deductions on account of living expenses by the sessions court in awarding pre-trial loss of earnings and post-trial (future) loss of earnings are not in clear departurefrom accepted principles.

C **[73]** The awards for partial loss of (future) earnings need not be disturbed under the circumstances, where the session court's particular manner of dealing with the amount of deductions need not be disturbed on appeal.

D **[74]** Save aforesaid, the rest of the appeal and cross-appeal are dismissed.

[75] Each party to bear its own costs.

Appeal allowed only on quantum of cost of prosthesis reduced from RM586,004 to E *RM254,877.*

Reported by Fatin Mohd Ismail

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